

The parties agreed claimant suffered a 10 percent scheduled disability to his left leg as a result of his work-related injury. The disputed issue was whether the claimant was a full-time or part-time employee. Claimant argued his average weekly wage should be calculated as a part-time employee pursuant to K.S.A. 44-511(b)(4)(A). Respondent argued claimant was a full-time employee and his average weekly wage should be calculated pursuant to K.S.A. 44-511(b)(4)(B).

The Administrative Law Judge (ALJ) found claimant was a full-time employee based upon his wage statement which indicated that for 7 of the 11 weeks he worked for respondent he had worked 40 hours a week. The ALJ concluded that evidenced a custom for claimant to work a 40-hour week.

The claimant requests review of whether he is a part-time versus a full-time employee. Claimant argues he is entitled to an average weekly wage of \$414.21 per week based upon his status as a part-time employee.

Respondent argues the ALJ's Award should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Mr. Storts was employed by Landis Priority Personnel, a temporary employment agency. Respondent had assigned claimant to work at only two different jobs before his accidental injury. He had been placed with a packaging company where he worked for 10 weeks. After that job ended he was assigned to work as an operator assistant at Pitt Plastics. Claimant was injured after working a few days at the job at Pitt Plastics.

Treg Brown, respondent's branch manager, testified:

Q. What was his status out at Pitt Plastics the way you understand it? Was he permanent out there or --

A. Well, basically he was on an on-call situation, an on-call operator.

Q. What does that mean?

A. Basically what they do is that an on-call operator basically, if someone would happen to go on vacation, take a leave of absence, or something like that, then we would have a list of back-up people that we would be able to call that were trained on several different machines, and Jason happened to be one of those people that was trained on those different positions.<sup>1</sup>

Mr. Brown further testified that claimant could have worked 60 or 90 days and then Pitt Plastics could have hired the claimant as a full-time employee. But if claimant was not hired then respondent would attempt to place him in a job elsewhere as they had done after the job at the packaging company had ended.

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<sup>1</sup> P.H. Trans. at 28.

Michelle Beckmann, Pitt Plastics' director of human resources, corroborated Mr. Brown's testimony that claimant was training to be an on-call employee, and an on-call employee did not work every day, instead worked only when he was needed. She testified:

Q. As far as the temp position he was working at, was that coming to an end?

A. They normally train for a week and then they would be placed on on-call status, and then he would be just used as needed.

Q. After a week, they are on call?

A. Uh huh.

Q. Does that mean they don't work every day?

A. That's correct.

Q. Just whether they need them or not?

A. Right.<sup>2</sup>

Ms. Beckmann further noted that it was possible that on-call status could result in regular daily work based upon employee turnover rates. And that if he worked for 60 days he could have become an employee of Pitt Plastics.

As noted by the ALJ the claimant's payroll summary indicated that for the 11 weeks he had been employed he had worked a 40-hour work week for 7 of those weeks. The other 4 weeks he had worked from 32 hours to 35 hours a week.<sup>3</sup>

The Act defines part-time and full-time workers in K.S.A. 44-511(a) as follows:

(4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

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<sup>2</sup> *Id.* at 40-41.

<sup>3</sup> R.H. Trans., Cl. Ex. 1.

(5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

Claimant was employed by respondent, a temporary personnel agency, which placed him in available jobs. The contractual arrangement between claimant and respondent was not explained in the evidentiary record. But the nature of the employment relationship between claimant and respondent was evidenced by his placement at Pitt Plastics. Mr. Brown and Ms. Beckmann both indicated that claimant had been placed at an on-call job with Pitt Plastics. Such on-call status meant that he would work when needed and there was simply no guarantee of the number of hours he would be expected to work in or during any given week. Stated another way, claimant was expected and agreed to work less than 40 hours per week as he only would work when needed.

The greater weight of the evidence indicates that claimant was given job assignments with no guarantee that he would work a minimum number of hours per day or per week. Finally, there was no evidence that claimant agreed or expected to work 40 hours per week. Based upon the entire evidentiary record the Board concludes claimant was a part-time employee for respondent.

K.S.A. 44-511(b)(4)(A) provides that the average gross weekly wage for a part-time hourly employee shall be determined in the manner provided in K.S.A. 44-511(b)(5) which requires the claimant's gross earnings over the weeks before the accident to be divided by the weeks actually worked up to a maximum of 26 weeks. In this instance the calculation results in an average gross weekly wage of \$414.21. Consequently, the ALJ's Award is modified to reflect claimant was a part-time employee with an average gross weekly wage of \$414.21.

The record does not contain a filed fee agreement between claimant and his/her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 2, 2007, is modified to reflect claimant was a part-time employee with an average gross weekly wage of \$414.21.

The claimant is entitled to 63.86 weeks of temporary total disability compensation at the rate of \$276.15 per week in the amount of \$17,634.94 followed by 13.61 weeks of permanent partial disability compensation, at the rate of \$276.15 per week, in the amount of \$3,758.40 for a 10 percent loss of use of the left leg, making a total award of \$21,393.34.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Geoffrey Clark, Attorney for Claimant  
       Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier  
       Kenneth J. Hursh, Administrative Law Judge